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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

JUNIE COLBY,

Plaintiff and Appellant,

v.

LOYOLA MARYMOUNT UNIVERSITY,

Defendant and Respondent.

B312915

(Los Angeles County Super. Ct. No. 18STCV03556)

APPEAL from judgment and orders of the Superior Court of Los Angeles County, Mark V. Mooney, Judge. Reversed and remanded with instructions.

Diana Gevorkian Law Firm, Diana Gevorkian for Plaintiff and Appellant.

Call & Jensen, David R. Sugden, Marlynn P. Howe, and Melinda Evans for Defendant and Respondent.

INTRODUCTION

Plaintiff and appellant Junie Colby appeals from the trial court's entry of summary judgment in favor of Loyola Marymount University (LMU) on her claims for failure to accommodate, failure to engage in the interactive process, and wrongful termination in violation of public policy. She also appeals from several interlocutory orders, including an order sustaining LMU's demurrer to her causes of action for disability discrimination, failure to prevent disability discrimination, retaliation, and failure to prevent retaliation.

For the reasons discussed below, we reverse the judgment and orders, and remand the matter for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

A. Relevant Factual Background

Colby worked in LMU's Financial Aid Department from 1979 until her termination. On February 27, 2017, Colby went to the emergency room, where she reported feeling exhausted, depressed, and hopeless. She stated she had not been able to sleep and had very little appetite.

LMU initially received notice of Colby's disability in the form of a Work Status Report (WSR) from Colby's health care provider, Kaiser Permanente. It consisted of one sentence stating: "This patient is placed off work from 2/28/2017 through 3/8/2017." Colby submitted a second WSR placing Colby off work "from 3/9/2017 through 3/13/2017." Despite the short duration of the second WSR, Colby notified her supervisor, Angle Harris, that she expected to be off from work for at least two months.

Colby submitted a third WSR placing her off work "from 3/13/2017 through 5/13/2017." On May 3, 2017, Colby met with Tracy Montgomery, a representative in LMU's Human Resources Department. Montgomery informed Colby that, pursuant to LMU's policy, Colby's medical leave eligibility would end 8/28/2017 (six months from Colby's first day of leave), and her employment would end if she was unable to return to work by that date.

Colby submitted a fourth WSR placing her off work "from 5/15/2017 through 8/15/2017." On May 17, 2017, LMU's Human Resources Department sent Colby a letter acknowledging receipt of the fourth WSR and reminding her of LMU's policy: "The current LMU staff policy states that staff members will be placed on an extended medical [leave], for a period not to exceed six months from the first day of the leave or the period during which the staff member has accrued sick pay, whichever period is longer." The letter further stated: "If you are unable to return to work by August 29, 2017, you will be separated from employment and your position will be posted." Colby responded to the letter by email on June 6, 2017. Colby expressed her dismay with how LMU was handling her medical issues, contending she had been subjected to "a hostile, racial, abusive, [and] demeaning environment." Colby concluded the email by stating she has a desire to work, "but due to severe anxiety I do not know yet if I could be able to return in August."

On June 13, 2017, LMU's Human Resources Department sent Colby another letter stating her extended medical leave eligibility ends August 28, 2017, and outlining her options as follows: "a. may be released to return to full duty in Financial Aid. [¶] b. may be released to return with work restrictions. In

this instance, you may request reasonable accommodations and we will engage in the interactive process. You should submit your request for modified duty to me along with medical certification describing the detailed nature of your restrictions. In consultation with Financial Aid we will respond to your request. [¶] c. may be close to full recovery (within 30-days) and may request a Personal Leave of Absence moving your return to work date to September 29, 2017. [¶] d. if you are unable to return to work with or without work restrictions either on August 29 or by September 29 having been granted Personal Leave of Absence your employment will be ended." The letter concluded with the following statement: "We have no recollection of you sharing allegations of discrimination with us during our May 3 meeting. . . . What I recall is you expressing how unfair you thought this situation is given your years of service and departmental turmoil that had occurred in the past. However, I encourage you to reach out to Sara Trivedi, Title IX Officer/EEO, to discuss the discriminatory harassment complaint process at [phone number]. The university takes such allegations seriously."

Colby sent an email response on June 30, 2017. She did not respond to the options LMU provided. Instead, Colby explained she was "moved to respond because your latest display of surprise regarding my concerns only validates the impression that I and other minorities have of LMU, that the University would rather continue turning a blind eye to discriminatory behavior that has affected students and staff rather than take action." She continued, "The hostility and ultimatums that I've encountered during our personal conversation[s] has sent me into panic attacks . . . . I will continue to work with my doctor and will keep you updated on the status of my requests for an accommodation."

On August 14, LMU received Colby's fifth WSR stating: "This patient is placed off work from 8/14/2017 through 11/14/2017."

On August 30, 2017, LMU terminated Colby's employment. The termination letter stated: "Our records indicate that you have been on medical leave of absence since February 28, 2017. You reached the six months allowed for an extended medical leave pursuant to the family/medical leave policy on August 28, 2017. Since you were unable to return to work on August 29, 2017, your employment with the University is being terminated as of this date. In the future, you are welcome to apply for any open position for which you are qualified."

B. DFEH Complaint and Original Complaint

On November 8, 2017, Colby filed an administrative complaint with the Department of Fair Employment and Housing (DFEH), alleging she was terminated from LMU in 2017 because of her race, taking medical leave, her age (over 60), and because she reported LMU's "unlawful actions."

On November 2, 2018, Colby filed her original complaint in this action, asserting the following 12 causes of action: (1) retaliation under Labor Code section 1102.5; (2) retaliation for discussing working conditions under Labor Code section 232.5; (3) race discrimination; (4) age discrimination; (5) disability discrimination; (6) failure to prevent discrimination; (7) retaliation under FEHA; (8) failure to prevent retaliation under FEHA; (9) interference with California Family Rights Act (CFRA)/Family and Medical Leave Act (FMLA) leave; (10) failure to accommodate; (11) failure to engage in good faith interactive

process; and (12) wrongful termination in violation of public policy.

In response, LMU filed a demurrer to the complaint. The trial court sustained the demurrer to the first nine causes of action, with leave to amend.

C. Partial Settlement and Release of Claims

On March 29, 2019, the parties entered into a partial settlement agreement and release (PSA). Under section 3(a) of the PSA, Colby agreed to dismiss with prejudice the following causes of action: "Second Cause of Action for Retaliation for Discussing Work Conditions Labor Code § 232.5; Third Cause of Action for Discrimination on the Basis of Race in Violation of FEHA Gov. Code § 12940, et seq.; and Ninth Cause of Action for Interference with CFRA/FMLA Leave" (the Released Claims). Section 3(b) stated in part: "[Colby] agrees to fully release and forever discharge [LMU] . . . from the Released Claims in the Action, and from any and all claims, causes of action, [and] damages . . . that were asserted or could have been asserted relating to the Released Claims."

D. First Amended Complaint

On April 2, 2019, Colby filed a First Amended Complaint (FAC) alleging the following causes of action: (1) retaliation under Labor Code section 1102.5; (2) disability discrimination; (3) failure to prevent discrimination; (4) retaliation under FEHA; (5) failure to prevent retaliation under FEHA; (6) failure to accommodate; (7) failure to engage in good faith interactive process; and (8) wrongful termination in violation of public policy. Colby added additional facts relevant to the first cause of action,

contending she objected to LMU's alleged discriminatory practices towards students. She also included additional allegations relating to age discrimination (i.e. that she was replaced with a substantially younger employee), but did not include a cause of action for age discrimination.

LMU filed a demurrer to the FAC's first through fifth causes of action. The trial court sustained LMU's demurrer, with leave to amend.

E. Second Amended Complaint

On July 8, 2019, Colby filed a second amended complaint (SAC), alleging the same causes of action as the FAC. LMU responded again by demurrer, but a few days later, Colby sought leave to amend the SAC to add a cause of action for age discrimination. The trial court granted Colby's motion to further amend the SAC to address the deficiencies raised by LMU's demurrer, but denied Colby's request to add a cause of action for age discrimination, finding Colby abandoned the claim.

F. Third Amended Complaint

Colby filed her third amended complaint (TAC) on September 26, 2019, asserting the same causes of action as the SAC. LMU filed its fourth demurrer on the first through fifth causes of action on the grounds that: (1) the first cause of action was time barred; and (2) the first through fifth causes of action failed to state facts sufficient to constitute a cause of action. The trial court sustained the demurrer to the TAC without leave to amend on the causes of action for disability discrimination, failure to prevent disability discrimination, FEHA retaliation, and failure to prevent FEHA retaliation (second through fifth

causes of action) but overruled the demurrer on the first cause of action for retaliation under Labor Code section 1102.5. Based on this ruling, the trial court also granted LMU's motion to strike the second through fifth causes of action from the TAC.

G. LMU's Motion to Enforce the PSA

Next, LMU filed a motion to enforce the PSA under Code of Civil Procedure section 664.6, requesting the court apply the release in the PSA to all remaining claims in the TAC. Relying on section 3(b) of the PSA, LMU argued Colby breached the PSA by continuing to pursue claims that were "related to" the Released Claims. The trial court granted the motion as to the first cause of action for retaliation under Labor Code section 1102.5, which at the time the parties entered into the PSA, mirrored the released cause of action for retaliation under Labor Code section 232.5, and had since been amended to allege in greater detail Colby's alleged complaints of race discrimination. It denied the motion, however, on the TAC's sixth, seventh, and eighth causes of action.

H. LMU's Motion for Summary Judgment

LMU moved for summary judgment on the three remaining causes of action in the TAC: failure to accommodate (sixth cause of action); failure to engage in good faith interactive process (seventh cause of action); and wrongful termination in violation of public policy (eighth cause of action). The trial court granted the motion, finding Colby's request for additional medical leave was tantamount to "indefinite leave": "The court finds that a request for indefinite medical leave is not a reasonable accommodation."

The trial court entered judgment in favor of LMU following its grant of LMU's summary judgment motion.

I. Appeal

Colby appeals from the judgment entered in favor of LMU, and the following interlocutory orders: (1) order denying leave to amend the SAC to add an age discrimination cause of action; (2) orders sustaining LMU's demurrer to the second through fifth causes of action in the TAC, and striking those causes of action from the TAC; and (3) order granting in part LMU's motion to enforce the PSA. Colby also appeals from a protective order entered by the trial court, as discussed more fully below.

DISCUSSION

I. LMU Is Not Entitled to Summary Judgment

A. Standard of Review

A party is entitled to summary judgment only if there is no triable issue of material fact and the party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. (*Id.*, subd. (p)(2).) If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. (*Ibid.*) A triable issue of fact exists if the evidence would allow a reasonable trier of fact to find the fact in favor of the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.)

B. Governing Legal Principles on Reasonable Accommodations and Good Faith Interactive Process

"Under [Government Code] section 12940, it is an unlawful employment practice 'to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee' unless the employer demonstrates doing so would impose an undue hardship. (§ 12940, subd. (m).) The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position [with accommodation]); and (3) the employer failed to reasonably accommodate the plaintiff's disability." (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1192.)

A leave of absence may be a reasonable accommodation if the leave is likely to be effective in allowing the employee to return to work at the end of the leave, with or without further accommodation, and the leave does not create an undue hardship for the employer. (2 Cal. Code Regs., § 11068, subd. (c).) "[A] finite leave can be a reasonable accommodation under FEHA, provided it is likely that at the end of the leave, the employee would be able to perform his or her duties." (*Hanson v. Lucky Stores, Inc*. (1999) 74 Cal.App.4th 215, 226 (*Hanson*).) An

employer is not required, however, to provide an indefinite leave of absence as a reasonable accommodation. (2 Cal. Code Regs., § 11068, subd. (c).) "The FEHA does not have a fixed limit on the amount of leave required as a reasonable accommodation. '[A] disabled employee is entitled to a reasonable accommodation—which may include leave of no statutorily fixed duration—provided that such accommodation does not impose an undue hardship on the employer.' (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1338.)" (*Zamora v. Security Industry Specialists, Inc.* (2021) 71 Cal.App.5th 1, 28.)

Government Code section 12940, subdivision (n) imposes an additional and independent duty on employers to engage in an "interactive process" regarding reasonable accommodations. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1003.) That provision establishes that it is an unlawful practice for an employer "to fail to engage in a timely, good faith, interactive process with the employee . . . to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee . . . with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n).)

C. Reasonable Accommodation

The trial court concluded Colby's repeated requests for medical leave constituted a request for indefinite leave. As noted above, under California law, indefinite leave is not a reasonable accommodation as a matter of law. (2 Cal. Code Regs., § 11068, subd. (c).) We conclude, however, that a jury could find it was unreasonable for LMU to assume Colby would continue to extend her medical leave indefinitely.

"Although an employer need not provide repeated leaves of absence for an employee who has a poor prognosis of recovery [citation], the mere fact that a medical leave has been repeatedly extended does not necessarily establish that it would continue indefinitely. In some circumstances, an employer may need to consult directly with the employee's physician to determine the employee's medical restrictions and prognosis for improvement or recovery." (*Nadaf-Rahrov v. Neiman Marcus Group., Inc.* (2008) 166 Cal.App.4th 952, 988-989 (*Nadaf-Rahrov*).)

In support of its motion for summary judgment, LMU submitted Colby's five WSRs, which placed Colby off work during the following dates in 2017: February 28 through March 8; March 9 through March 13; March 13 through May 13; May 15 through August 15; and August 14 through November 14. Based on the repeated extensions of leave, LMU asserted the undisputed evidence demonstrated the fifth WSR was not a projected return to work date; rather, LMU argued, Colby would continually be placed off work consistent with each of the previous WSRs. In further support of this argument, LMU relied on a declaration Colby submitted in May 2018 when applying for disability benefits with the Social Security Administration. In it, Colby declared "I became unable to work because of my disabling condition on March 7, 2017" and "I am still disabled."

In opposition, Colby submitted deposition testimony of her primary care physician, Neelam Pathikonda, M.D. Dr. Pathikonda testified had Colby not been terminated, although she could not state the exact date Colby would be able to return to work, she believed that "[Colby] was close [to being able to return to work] on or around November 15." She further testified had LMU contacted her for a prognosis, she would have informed

LMU that November 15, 2017 was Colby's estimated return date. Dr. Pathikonda also testified she did not believe Colby had a mental health condition that would require her to be off from work for a full year. According to Dr. Pathikonda, however, Colby's termination "exacerbate[d] her major depressive disorder" and she experienced the termination "as a trauma."

LMU counters that Colby failed to demonstrate she informed LMU of a date she expected to return to work. As stated in *Nadaf-Rahrov*, however, an "employer may need to consult directly with the employee's physician to determine the employee's medical restrictions and prognosis for improvement or recovery." (*Nadaf-Rahrov, supra,* 166 Cal.App.4th 952 at p. 989.) LMU failed to do so here. Instead, after receiving Colby's fifth WSR, placing her off work for an additional three months, LMU terminated Colby's employment. According to the termination letter, LMU terminated Colby's employment based on its six-month maximum leave policy, not because Colby requested indefinite leave.

Moreover, Colby's declaration submitted to the Social Security Administration, stating she was unable to work in May 2018, does not conclusively establish Colby would have been unable to work as of November 15, 2017. Rather, if a jury credits Dr. Pathikonda's testimony, it could reasonably find that Colby would have been able to return to work in November of 2017 absent the major set-back of her termination.

On this record, we conclude material issues of fact preclude summary judgment on the issue of whether Colby's medical leave

was indefinite, or whether permitting Colby to take additional leave was a reasonable accommodation under the circumstances.[1]

D. Failure to Engage in The Interactive Process

To prevail on a FEHA interactive process claim, a plaintiff must show that a reasonable accommodation existed at the time the interactive process should have taken place. (*Scotch v. Art Institute of California, supra,* at pp. 1018-1019; see also *Nadaf-Rahrov, supra*, 166 Cal.App.4th at 980-981 ["[A]n employer may be held liable for failing to engage in the good faith interactive process only if a reasonable accommodation was available.]."")

LMU contends the only accommodation Colby requested was further leave, which as a matter of law is not a reasonable accommodation. As discussed above, however, material issues of fact exist regarding whether Colby's additional leave request was reasonable. After receiving the fifth WSR, rather than engaging with Colby, LMU terminated her employment. Viewing the facts in the light most favorable to Colby, a jury could find that LMU's decision to terminate Colby without further discussion regarding her prognosis and likelihood of returning at the expiration of the fifth WSR (November 15, 2017) caused a breakdown in the interactive process.

Thus, we conclude the trial court erred by granting LMU's motion for summary adjudication of Colby's failure to engage in the interactive process cause of action.

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1 We note LMU does not argue, and provided no evidence that, granting Colby additional medical leave would present an undue hardship to the University.

E. Wrongful Termination

LMU concedes Colby's cause of action for wrongful termination in violation of public policy is premised entirely on LMU's alleged failure to accommodate and failure to engage in the interactive process. We therefore conclude LMU is not entitled to summary adjudication of this claim for the same reasons it is not entitled to summary adjudication of Colby's failure to accommodate and engage in the interactive process claims.

II. Colby's Appeal from Interlocutory Orders

A. Order Denying Leave to Amend the SAC to Add an Age Discrimination Cause of Action

a. Background

Colby filed her initial complaint on November 2, 2018. The complaint alleged a cause of action for age discrimination, and included the following allegations scattered throughout the complaint: Colby was over the age of 60 when she was terminated, she received excellent performance reviews throughout her employment, LMU declined to promote Colby in favor of hiring a substantially younger individual in 2016, and Colby feared LMU intended to "age her out as it did with others." The trial court sustained LMU's demurrer to the age discrimination cause of action for failure to state a claim, with leave to amend.

Colby filed her FAC on April 2, 2019, but failed to include a cause of action for age discrimination (inadvertently, according to Colby's counsel). The FAC included additional allegations of age

discrimination, however, including she "is informed and believes and on that basis alleges" that, after her termination, "LMU reposted her position in an effort to find a replacement and . . . her position remained unfilled for months until [LMU replaced] her with a substantially younger employee."

After the trial court sustained LMU's demurrer to the FAC on the first through fifth causes of action, Colby filed the SAC. She also filed a motion for leave to amend the SAC[2] to, among other things, add a cause of action for age discrimination, and include an allegation that age was a substantial motivating reason for her termination.

The trial court denied Colby's motion to amend the SAC to add the age discrimination cause of action. The trial court explained: "When the court sustained the demurrer with leave on age discrimination in the original complaint . . . you had the opportunity in the first amended to add whatever you needed to add to beef up that cause of action. That's why I give you leave to amend on these things, but you didn't do it. And in the second amended complaint, it wasn't in there. So I think it's clearly abandoned."

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2 Colby could not simply add the age discrimination claim to the SAC without obtaining leave from the trial court. (See Code Civ. Proc., 472 subd. (a) ["A party may amend its pleading once without leave of the court at any time before the answer, demurrer . . . is filed."].)

b. The Trial Court Abused Its Discretion By Denying Leave to Amend the SAC to Add a Cause of Action for Age Discrimination

We review the trial court's denial of Colby's motion for leave to amend the SAC for abuse of discretion. (*Berman v. Bromberg* (1997) 56 Cal.App.4th 936, 945.) Generally, motions for leave are liberally granted absent a showing of prejudice. (*Ibid*; see also *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048 ["[I]t is an abuse of discretion to deny leave to amend where the opposing party was not misled or prejudiced by the amendment."].) "When amendment would be futile[,] [however,] because the amended [complaint] would be barred by the statute of limitations, the trial court does not abuse its discretion in denying the motion for leave to amend." (*Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1124.)

LMU does not contend it would have been prejudiced by the amendment, nor did the trial court make such a finding.[3] Rather, LMU argues the amendment would be futile because the proposed cause of action was time-barred. We disagree.

"The relation-back doctrine deems a later-filed pleading to have been filed at the time of an earlier complaint which met the applicable limitations period, thus avoiding the bar." (*Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256, 1278) The doctrine applies if the amended complaint: (1) rests on the same general set of facts; (2) involves the same injury; and (3) refers to the same instrumentality. (*Ibid.*)

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3 No trial date had been set at the time of the hearing on the motion to amend.

As discussed above, Colby's original complaint alleged LMU declined to promote Colby in favor of hiring a substantially younger individual in 2016, and she feared LMU intended to "age her out as it did with others." The FAC added the allegation that after she was terminated, "LMU reposted her position in an effort to find a replacement and that her position remained unfilled for months until replacing her with a substantially younger employee." Colby's proposed amendment to the SAC would explicitly plead that her age was a substantial motivating reason for her termination.

At the outset, we reject LMU's contention that Colby's proposed cause of action could not relate back to the original complaint because Colby abandoned her age discrimination claim in the intervening complaints. (See e.g. *Walton v. Guinn* (1986) 187 Cal.App.3d 1354, 1360 ["[W]e do not compare the last two amended complaints to determine if the relation-back doctrine applies to avoid the statute of limitations. Rather, we look to the final amended complaint and the original complaint to see if the doctrine applies."].)

Next, LMU argues the proposed age discrimination cause of action relies on different factual allegations and a different instrumentality than was alleged in the original complaint. We disagree. Although the original complaint failed to specifically allege Colby's age was a substantial motivating reason for her termination, it did plead that Colby "feared LMU intended to age her out as it did with others." The proposed amendment, therefore, expands on the allegations in the original complaint in an effort to state a viable claim that can withstand a demurrer. (See *Austin v. Massachusetts Bonding & Ins. Co*. (1961) 56 Cal.2d 596, 600 ["[T]he amended complaint will be deemed filed as of the

date of the original complaint provided recovery is sought in both pleadings on the same general set of facts"]; see also *Pointe San Diego Residential Community, L.P. v. Procopio, Corry, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 277 ["In determining whether the amended complaint alleges facts that are sufficiently similar to those alleged in the original complaint, the critical inquiry is whether the defendant had adequate notice of the claim based on the original pleading."].)

Lastly, LMU contends the amendment would be futile because Colby did not exhaust administrative remedies for the proposed age discrimination claim by filing a complaint with the DFEH within one year of the alleged unlawful practice and obtaining a notice of right to sue. Specifically, it argues Colby's proposed new age discrimination allegations were not included in Colby's DFEH complaint. Although lacking in clarity, Colby's DFEH complaint alleged she was terminated from LMU in 2017 because of, among other things, her age. Thus, Colby exhausted her administrative remedies by specifying the unlawful act in her DFEH complaint. (See *Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1724 ["To exhaust his or her administrative remedies as to a particular act made unlawful by the [FEHA], the claimant must specify that act in the administrative complaint, even if the complaint does specify other cognizable wrongful acts."].)

We conclude LMU failed to demonstrate the amendment would be futile. Thus, because LMU concedes it would not be prejudiced by the amendment (by not arguing the issue), the trial court abused its discretion by denying leave to amend to add an age discrimination cause of action.

B. Orders Sustaining LMU's Demurrer to the Second Through Fifth Causes of Action in the TAC, and Striking Those Causes of Action From the TAC

"In determining whether [a plaintiff] properly stated a claim for relief, our standard of review is clear: '"We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action." (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126 (*Zelig*).)

a. Disability Discrimination and Failure to Prevent Disability Discrimination

Colby contends the trial court erred by sustaining LMU's demurrer to her second and third causes of action for disability discrimination and failure to prevent disability discrimination, respectively. We agree.

A prima facie claim of disability discrimination under FEHA requires a showing that: (1) the plaintiff suffered from a disability; (2) the plaintiff was otherwise qualified to do his or her job, with or without reasonable accommodation; and (3) the plaintiff was subjected to adverse employment action because of the disability. (*Green v. State of California* (2007) 42 Cal.4th 254, 262.)

The TAC alleges a prima facie claim for disability discrimination as follows: (1) Colby suffered from a disability

(anxiety and depression); (2) Colby notified LMU that her disability necessitated additional medical leave through November 14, 2017; and (3) LMU terminated Colby's employment on August 29, 2017 because she was unable to return to work "within LMU's medical leave policy which limits medical leave to six months."

LMU argues Colby failed to allege the second element of a disability discrimination claim because she was unable to perform the essential duties of her job. LMU claims the "August 14, 2017 WSR was the fifth in a succession placing Colby entirely off work for at least nine months with no definite end in sight." But these arguments ignore the allegations in the TAC, which we must accept as true for purposes of demurrer. (*Zelig, supra,* 27 Cal.4th at p. 1126.)

The TAC alleged Colby would have returned to work on or about November 15, 2017, and she "would have been able to perform her essential job duties with or without a reasonable accommodation."

We likewise reject LMU's argument that Colby failed to allege facts showing her disability was a substantial motivating factor for her termination. LMU asserts there is "no allegation [in the TAC] that Colby told LMU of her alleged plans to return to work on November 15, 2017." At the demurrer stage, all that is required is that the plaintiff was subjected to an adverse employment action because of her disability. Here, the TAC alleges Colby was on medical leave due to her disability, and LMU terminated her because she reached the six months LMU allowed for an extended medical leave. The TAC further alleges: "LMU subjected [ ] Colby to adverse employment action including but not limited to termination because of her disability. [ ] Colby's

disability was a substantial motivating reason for LMU's decision to take adverse action against her." These allegations sufficiently allege a cause of action for disability discrimination. (See e.g. *Diaz v. Fed. Express Corp*. (2005) 373 F.Supp.2d 1034, 1064 ["Although Defendant may have fired Plaintiff because of his absences . . . if the trier of fact believes that Plaintiff's absences were caused by that disability, Plaintiff will have established that Defendant's termination of Plaintiff was an adverse employment action taken because of Plaintiff's disability."].)

Accordingly, the trial court erred by sustaining LMU's demurrer on the second cause of action. Moreover, LMU's sole argument in support of its contention that Colby failed to state a claim for failure to prevent disability discrimination is that a "'failure to prevent' discrimination claim cannot be maintained where there is no underlying discrimination." Because we conclude that Colby adequately alleged a claim for disability discrimination, we also conclude the trial court erred by sustaining LMU's demurrer to the TAC's third cause of action.

b. FEHA Retaliation and Failure to Prevent Retaliation

Colby also contends the trial court erred by sustaining LMU's demurrer to her fourth and fifth causes of action for retaliation in violation of FEHA and failure to prevent retaliation, respectively. Again, we agree.

To state a prima facie case of retaliation under FEHA, "'a plaintiff must [plead] (1) he or she engaged in a "protected activity," (2) the employer subjected the employee to an adverse employment action, and (3) a causal link existed between the protected activity and the employer's action.'" (*Moore v. Regents*

of University of California (2016) 248 Cal.App.4th 216, 244.) The TAC alleges each of these elements as follows: "Colby opposed and reported LMU's discriminatory and retaliatory treatment of others and herself . . . and [LMU] fail[ed] to accommodate her requests for an accommodation including a medical leave of absence due to her health issues"; and "As a result, she was subjected to a series of adverse employment actions. LMU ultimately terminated [ ] Colby." The TAC further alleges "Colby's disclosure of violations of California and Federal law contributed to LMU'S decision to retaliate against [ ] Colby."

LMU argues Colby alleged no facts suggesting a causal connection between her alleged FEHA-protected activity and her termination. But the TAC pleads Colby was terminated "[a]s a result of" reporting discriminatory and retaliatory treatment of others and herself.[4] At the demurrer stage, Colby's ability to "prove these allegations, or the possible difficulty in making such proof, does not concern the reviewing court." (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 604.)

Accordingly, the TAC sufficiently pleads a claim for retaliation under FEHA, and the trial court erred by sustaining LMU's demurrer to the fourth cause of action. Moreover, in

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4 LMU notes that any alleged acts of retaliation prior to November 8, 2016 (more than a year before Colby filed the DFEH complaint), are outside the one-year limitations period for FEHA claims. Colby counters that she suffered a continuous pattern of retaliation since at least 2007. We need not decide whether the continuing violation doctrine applies for purposes of LMU's demurrer. LMU concedes Colby's termination (i.e. an adverse action) occurred within the one-year statute of limitations, and as discussed above, Colby sufficiently pleads she was terminated as a result of engaging in protected activity under FEHA.

support of its contention that Colby failed to state a claim for failure to prevent retaliation, LMU again limits its argument to the following: A "'failure to prevent' retaliation claim cannot be maintained where there is no FEHA-actionable retaliation." Because Colby adequately alleged a claim for retaliation, we conclude the trial court erred by sustaining LMU's demurrer to the TAC's fifth cause of action for failure to prevent retaliation.

C. Order that Bars Colby's First Cause of Action for Retaliation Under Labor Code Section 1102.5

a. Background

After the trial court sustained LMU's demurrer to the original complaint to the first nine causes of action with leave to amend, the parties entered into the PSA. Colby agreed to dismiss with prejudice three causes of action (the Released Claims): "Second Cause of Action for Retaliation for Discussing Work Conditions Labor Code § 232.5; Third Cause of Action for Discrimination on the Basis of Race in Violation of FEHA Gov. Code § 12940, et seq.; and Ninth Cause of Action for Interference with CFRA/FMLA Leave" (the Released Claims).

As detailed above, LMU filed three subsequent demurrers in response to Colby's amended complaints. Each of the amended complaints continued to include a claim for retaliation under Labor Code section 1102.5 (section 1102.5 claim). After the trial court overruled LMU's fourth demurrer to the section 1102.5 claim in the TAC, LMU filed a motion to enforce the PSA. Relying on section 3(b) of the PSA, which stated Colby releases LMU from the Released Claims and "any and all claims . . . that were asserted or could have been asserted relating to the Released

Claims," LMU argued Colby's section 1102.5 claim should also be dismissed. LMU asserted the section 1102.5 claim mirrored Colby's retaliation claim under Labor Code section 232.5, which Colby expressly dismissed. The trial court agreed with LMU, stating that because the "exact same allegations" support both claims, the section 1102.5 claim "could have been made" and therefore, is encompassed by the PSA.

b. Analysis

"A settlement agreement is a contract, and the legal principles which apply to contracts generally apply to settlement contracts." (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 810.) "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting." (Civ. Code, § 1636.) "'[E]ven if one provision of a contract is clear and explicit, it does not follow that that portion alone must govern its interpretation; the whole of the contract must be taken together so as to give effect to every part.'" (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 799.)

Here, during the pendency of the action, the parties entered into a *partial* settlement agreement. Colby agreed to dismiss with prejudice three causes of action listed in section 3(a), which did not include the section 1102.5 claim. Although section 3(b) releases LMU from the Released Claims and "any and all claims . . . that were asserted or could have been asserted relating to the Released Claims," interpreting the PSA as a whole (specifically, sections 3(a) and 3(b), together), the only reasonable interpretation of section 3(b) is that it governs claims that might be brought by Colby against LMU in *subsequent* lawsuits (not

claims that remained in the original complaint, but that were not specifically listed as a released claim in section 3(a)). Had the parties intended to release additional, existing causes of action alleged in the complaint, those causes of action would have been listed in section 3(a).

LMU's reliance on *Shine v. Williams-Sonoma, Inc.* (2018) 23 Cal.App.5th 1070, 1079 (*Shine*) is misplaced. There, the parties entered into a settlement agreement disposing entirely of the action. (*Id.* at p. 1074.) The plaintiff then filed another complaint in a second action against the same defendant alleging similar claims to those dismissed in the first action. (*Id.* at p. 1075.) The court held the claims in the second lawsuit were barred by the settlement agreement entered into in the first lawsuit, explaining: "'"The release of 'all claims and causes of action' must be given a comprehensive scope. [¶] If courts did not follow this rule, 'it [would be] virtually impossible to create a general release that . . . actually achieve[d] its literal purpose' . . ., and language releasing all claims would be inherently misleading, causing unfair surprise to parties that offer payment on the reasonable expectation that all claims are settled, only later to face continuing litigation. . . . Moreover, if courts did not enforce general releases, an employer . . . seeking a comprehensive settlement, would have to struggle to enumerate all claims the employee might plan to allege. The employer would never be able to know for sure that it had thought of every claim, and therefore it would never be able to put a definitive end to the matter." (*Id.* at pp. 1079-1080, quoting *Villacres v. ABM Industries Inc.* (2010) 189 Cal.App.4th 562, 589.) None of those concerns are present here. The parties understood that, at the time they entered in the PSA, the lawsuit was ongoing (on the

remaining, non-released claims). It was hardly a surprise to LMU that Colby continued to litigate claims that existed at the time the parties entered into the PSA, but were not specifically released.

Thus, interpreting the PSA as a whole, we conclude the mutual intent of the parties was to dismiss the three causes of action specified in the PSA, and not any other existing causes of action alleged in the complaint. The trial court therefore erred by finding the section 1102.5 claim was encompassed by the release in the PSA.

D. Order Granting LMU's Motion for Protective Order

After granting LMU's motion to enforce the PSA as to Colby's 1102.5 claim, the trial court granted, in part, LMU's motion for a protective order on special interrogatories relevant to the section 1102.5 claim. In light of our conclusion that the PSA did not release the section 1102.5 claim, on remand, we direct the trial court to reconsider its ruling granting LMU's motion as to Special Interrogatories Nos. 74–112.

DISPOSITION

The judgment is reversed. The following orders are also reversed: (1) September 11, 2019 order to the extent it denied leave to amend to add an age discrimination cause of action; (2) January 2, 2020 order sustaining LMU's demurrer to the TAC on the second through fifth causes of action; (3) July 1, 2020 order to the extent it granted LMU's motion to strike the second through fifth causes of action in the TAC; and (4) August 31, 2020 order granting in part LMU's motion to enforce the PSA by dismissing the first cause of action for retaliation under Labor

Code section 1102.5. The trial court is directed to reconsider its September 4, 2020 order granting LMU's motion for a protective order on Colby's Special Interrogatories Nos. 74–112. The matter is remanded for further proceedings consistent with this opinion. Colby is awarded her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURREY, J.

We concur:

WILLHITE, Acting P.J.

MICON, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.